UNITED NATIONS **E**

Economic and Social Council

Distr.
GENERAL

E/C.12/2001/6
12 March 2001

Original: ENGLISH

COMMITTEE ON ECONOMIC, SOCIAL
AND CULTURAL RIGHTS
Twenty-fifth session
Geneva, 23 April-11 May 2001
Item 5 of the provisional agenda

SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: INTERNATIONAL CONSULTATION "ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE DEVELOPMENT ACTIVITIES OF INTERNATIONAL INSTITUTIONS" ORGANIZED IN COOPERATION WITH THE HIGH COUNCIL FOR INTERNATIONAL COOPERATION (FRANCE)

Monday, 7 May 2001

Global economic governance and national policy autonomy in the pursuit of economic, social and cultural rights

Background paper submitted by Hamish Jenkins* **

* Hamish Jenkins is Programme Officer at the United Nations Non-Governmental Liaison Service (UN/NGLS).

** The views expressed in the background paper are those of the author and do not necessarily reflect those of UN/NGLS or the United Nations. The paper is issued as received.

GE.01-40960 (E)

Introduction

1. The International Covenant on Economic, Social and Cultural Rights adopted by the United Nations General Assembly in 1966 was premised on the notion that State parties had sufficient political and economic space to develop the best combination of policies adapted to their given domestic context to protect and promote the rights enshrined in the Covenant. The Covenant does not spell out a uniform recipe to achieve these rights, and in this sense recognizes that specific policy options (particularly in the realm of macroeconomic policy) are only potential means to the end of improving human well-being, which may or not be appropriate depending on context.

2. However, in its November 1999 statement to the third Ministerial Conference of the World Trade Organization, the Committee noted that it "has become increasingly aware of the extent to which international economic policies and practices affect the ability of States to fulfil their treaty obligations". And indeed, one of the central messages that emerged from the tenth session of the United Nations Conference on Trade and Development (UNCTAD X), held in Bangkok on 12-19 February 2000, is that the range of policy options available to Governments has been shrinking, particularly in developing countries, as a result of various dimensions of globalization.[1] In other words, the tendency has been for national policies to adapt domestic economic and social conditions to an increasingly competitive global environment rather than the other way around.

3. Some participants at UNCTAD X argued that globalization is "unstoppable" and the only policy options are to maximize the benefits and minimize the damage. Others however, such as UNCTAD Secretary-General, Rubens Ricupero and ILO Director-General, Juan Somavia, insisted that globalization is at least in part a deliberate construction. A distinction must be made between objective forces of technological change driving the globalization of production and economic exchange, and the policies which have accompanied (and in some cases, driven) globalization, such as indiscriminate liberalization, privatization and deregulation. These are the result of conscious choices, and can be changed if and when they are proving harmful to human well-being and social progress.

4. This historical juncture poses a formidable challenge to the human rights community, and to the United Nations Committee on Economic, Social and Cultural Rights in particular. The challenge is conceptual as much as it is political and organizational, given the complexity and tensions between factors such as: the increasing interdependence of national economies; local and national democratic prerogatives which may vary from one jurisdiction to another; and sharp asymmetries in economic and political power at national and international levels. An attempt to reconcile these different factors from a human rights perspective is captured in the joint official NGO statement to UNCTAD X, which was adopted in Bangkok by 160 representatives of NGOs and social movements from over 40 countries. Its preamble reads:

5. "We propose the development of a system of global governance that respects local democratic prerogatives and is based on global conventions agreed to at the United Nations. The principles of such a pluralistic and participatory form of international governance must constitute the over-arching principles and regulatory frameworks within which all global, regional, national

and local governmental institutions and corporations, and all people, should cooperate. These fundamental principles must be based on the primacy of human rights obligations, which include the principles of non-discrimination, progressive realization and non-retrogression."[2]

6. This paper briefly outlines the various factors that have reduced the range of policy options available at the national level, in a manner that has proved seriously detrimental to human rights, and sets out some of the human rights principles that could be invoked to help reverse this trend.

7. However, it must be emphasized from the outset that the case made here in favour of greater national policy autonomy is in no way an end in itself. Rather, since political systems are still fundamentally based on the nation state, greater national policy autonomy should be seen only as a prerequisite for local and national democratic struggles to gain the political space required to pursue the goals of economic justice and solidarity. At the same time, given inter alia the increased interdependence of national economies and the growth of systemic factors such as the transnational power of financial markets and institutions, renewed efforts to better understand the human rights responsibilities of States to the international community are also called for.

8. In particular, member States that have signed and ratified the International Covenant on Economic, Social and Cultural Rights have legal obligations to "achieve progressively" the full rights set out in the Covenant, and must also afford "international assistance and cooperation" for this purpose. In other words, Governments must demonstrate, individually and collectively, that they are taking concrete steps toward realization of these rights. A major duty deriving from these obligations is the "principle of non-retrogression" - meaning that State parties must not take retrogressive measures (through law or policy) that would jeopardize existing achievements, except in the limited circumstances specifically provided for in the relevant human rights instrument.

Loss of Policy Autonomy in the Global Trading System

9. Discussions at UNCTAD X revealed the extent to which developing countries have been pressured to liberalize their trading regimes through structural adjustment programmes promoted by the World Bank and the IMF. As with the range of other policies typifying such programmes, such as fiscal austerity, deregulation and privatization, these were said to be driven more by ideology and interest than economic pragmatism. According to a paper presented by Consumers International to UNCTAD X, "full trade liberalization in developing countries has served, above all, to open these countries' economies to exports from industrialized countries, without necessarily stimulating economic growth or greater consumption for the population at large. On the contrary, it tends to reinforce existing inequalities between and within them in terms of consumption levels." Meanwhile, industrialized countries - that have not been subject to structural adjustment programmes of the international financial institutions (IFIs), and enjoy much greater bargaining power and institutional resources in the WTO - have maintained comparatively much higher trade barriers in sectors of interest to developing countries.

10. The 1999 edition of UNCTAD's Trade and Development Report also highlights that developing countries' "excessive" trade liberalization has caused them to suffer from chronic balance-of-payments problems due to their inability to match the costs of the surge of imports

with greater export earnings. To compensate this, developing countries have had to attract more private financial flows, much of which ended up being short-term speculative capital - that only made matters worse, by exchange rate appreciations and increased financial instability and crises.

11. Although the misguided nature of these policies is increasingly recognized, it would be very difficult under current WTO rules for developing countries to reverse trade liberalization policies in areas that have proven detrimental. In fact, developing countries have committed themselves to a range of agreements in the WTO, such as the ones on agriculture, trade-related investment measures and intellectual property rights which, if implemented, would further reduce their policy options, in terms of selective protection and promotion measures in the public interest and in the interest of vulnerable groups.[3]

Calls for Affirmative Action

12. The introduction of the human rights principles of "non-discrimination" in the debate shed new light on these issues at UNCTAD X. In its proposals to UNCTAD, the joint NGO statement says:

13. "International trade and investment rules promoted by the dominant global economic institutions are aimed at creating a 'level playing field' between all economic players, irrespective of their scale and economic power. This understanding of 'non-discrimination' in national treatment provisions assumes that equal rules should apply to very unequal players. So far, this tendency has only been resisted through 'special and differential treatment' provisions, which in the WTO most often do not have contractual status and rely on artificial and arbitrary time-frames unrelated to need and capacity."

14. The text goes on to argue:

15. "We call for a human rights application of 'non-discrimination', which is premised on the need for affirmative action by the State to protect and promote vulnerable groups and sectors to avoid discrimination and further marginalization. In other words, these measures are not a special favour granted to developing countries and their citizens, but are fundamental components of their right to development."

16. In his opening statement to UNCTAD X, Mr. Ricupero also stressed the limitations of current international economic rules and policies to satisfactorily take account of large differences in economic power, as well as the benefits of integrating human rights principles into economic governance:

17. "Some still insist that the problem will be better dealt with by bringing about a level playing field, by just eliminating price-distorting mechanisms, by creating equal opportunity for all. Is it really serious to pretend that equal opportunities will suffice when people and countries start from astronomically distant starting points? How truly equal is equal in this case? Should we not recognize that the game of competition requires, as all games do, not only clear rules and impartial arbiters but training, preparation as well? Is this not what countries that have long-deprived and underpriviledged minorities do with their 'affirmative action' programmes

aimed not at some hypothetical equality but at the actual equality of providing the needy, that is, the unequal, with specific, differentiated, opportunities to learn how to compete, how to produce, how to trade?"

18. This poses a practical challenge to the Committee. If in the course of its review of individual country reports, it notes that country after country are no longer taking the necessary steps - say, to protect local farmers from agricultural imports that would wipe out their local source of livelihood - measures that would be legitimate (and in fact, called for) under the Covenant, but disallowed under WTO rules, what recommendations can the Committee give to the State party? If the State party chooses on its own to conform first and foremost to the Covenant (which the primacy of human rights obligations would imply), but at the cost of de facto violating WTO rules, it risks facing trade sanctions from other WTO members, that in themselves may cause human rights violations. Would the Committee not need to find a way to address the collectivity of WTO members that are also State parties to the Covenant on this question? In particular, should it not encourage developing countries to actively use their legal obligations under the Covenant in the current review processes and negotiations that are underway at the WTO?

Pressures by the International Financial System

19. The international financial system is posing similar constraints on the ability of national Governments to conform to their human rights obligations. There are two main dimensions to this. One is the pressure of international financial institutions through structural adjustment conditionalities; the second is what UNCTAD has defined as the "discipline" that financial markets are able to impose on national Governments' choice of monetary and fiscal policies. Both are related but are best treated separately.

20. There is no space here to present a full review of structural adjustment programmes of IFIs. Their detrimental human rights impact have been well documented elsewhere.[4] However, it is worth dwelling a moment on UNCTAD's analysis of the way the East Asian financial crisis was managed by the international community through the IMF, and which was also widely discussed at UNCTAD X. Much of the causes of the financial crisis can be attributed to rapid financial deregulation and capital account liberalization, which had been promoted by the G-7 Governments and the IMF, but also pursued quite autonomously from external pressure by some developing country Governments. When the crisis hit and foreign investors withdrew their funds in a panic exit, countries turned to the IMF in search of liquidity. However, the IMF systematically insisted that the only policy option to stabilize the financial system was to exercise fiscal austerity and to significantly raise the interest rate in order to restore international investor confidence. This plunged these economies into recession by causing a cascade of bankruptcies and millions of job losses in a context of a virtual absence of social security systems. One country, Malaysia, chose a different track, namely by instituting temporary capital controls, which allowed the country to stabilize its financial system without causing a recession. According to the Financial Times, immediately after this, Indonesia in its negotiations with the IMF had asked to follow a similar course as Malaysia, but such an option was denied.

21. The bottom line in this episode is that there was more than one policy option, even in the midst of crisis. The option imposed by the IMF, as it turned out, mainly served to bail out

international creditors for their speculative mistakes and reassure international financial markets - at the cost of knowingly causing human rights violations on a massive scale. The other option was to put the interests of local workers and domestic firms before those of international financial markets - and whether explicitly or not, choose a course of action that conforms more closely to the principle of non-retrogression.

22. Therefore, at one level it could be argued that the IMF prevented these countries from conforming to their human rights obligations. However, it remains to be seen the extent to which Governments of affected countries explicitly invoked their legal obligations under the Covenant in their negotiations with the IMF. This may be a line worth pursuing by the Committee in its reviews of country reports. But perhaps more important is the responsibilities of the IMF member Governments that enjoy the greatest voting powers in the institution, namely the G-7 countries. To what extent do they take seriously into account their duty to cooperate internationally in the protection and promotion of economic, social and cultural rights, in the voting decisions they make in the governing boards of IFIs? Is it a violation of their Covenant obligations to take decisions in these bodies that will cause human rights regressions in other countries?

23. The same line of questioning could be directed at Governments' failure to act collectively in terms of curbing the excessive powers that financial markets can now exercise on individual countries' choice of macroeconomic policies. The "discipline" that financial markets and corporations can impose on Governments' policy choices, notably through threats of relocation and speculative currency attacks, has been made possible by the so-called rapid "exit option" capital holders now enjoy as a result of widespread financial liberalization in recent years.

24. This is particularly manifest in two main areas of concern to the Committee. Firstly, Governments are pressured to adopt what is called "deflationary" macroeconomic policies (e.g. fiscal austerity and high interest rates) which have squeezed growth and employment. This limits their capacity to fulfil their obligations related to the progressive realization of the right to work. When high employment rates have been achieved under these conditions, such as in the United States and the United Kingdom, this has been correlated with an increasing flexibilization and casualization of labour conditions, which themselves are a source of human rights regressions.[5] What steps are State parties to the Covenant taking individually and collectively to reverse this trend?

25. Secondly, widespread financial liberalization has also limited the capacity of rich and poor countries alike to develop or maintain progressive taxation regimes. In recent years, the tax burden has shifted from highly mobile large capital holders, who can increasingly play one tax jurisdiction against another, to relatively immobile labour and small enterprises. Given the political limits of regressive taxation systems, tax competition between States has led to a gradual erosion of State revenue - a crisis of the welfare State, happening at precisely a time where more funds for social programmes are needed to buffer the social dislocations caused by globalization.[6] What are State parties to the Covenant doing individually and collectively to ensure they have the financial means to fulfil their citizens' rights to adequate social security and other essential social services?

Conclusion

26. The above discussion suggests three main avenues which the Committee may wish to pursue. One is through new lines of inquiry in its reviews of individual country reports, such as the ones suggested in this paper. The second, is to find alternative ways to address the collectivity of State parties on systemic problems, that is, problems that cannot be resolved by autonomous actions at the national level. The Committee's statement to the third WTO ministerial conference set an important precedent. Other statements of this nature could be developed in the future. In addition, a series of consultations, with Governments, multilateral agencies and civil society (such as the one organized for the Committee's 7 May 2001 day of general discussion) with a view to better understanding and updating the parameters of State parties' duties to the international community alluded to, for instance, in article 2.1 of the Covenant.

27. At the same time, while it is essential to pursue greater policy coherence between international human rights-oriented institutions and international trade and financial institutions, it would also be necessary to pursue the same endeavour at the national level, between different line ministries, particularly within the more influential countries such as the G-7. Institutional arrangements such as the High Council for International Cooperation in France, may offer useful insights in this regard.

Notes

[1] This Conference, which acted as a kind of "forum on globalization" allowed for a frank exchange between member States, heads of multilateral institutions, NGOs and academics, against the backdrop of an evident crisis of global economic governance - manifest in the collapse of talks at the third ministerial meeting of the World Trade Organization (WTO) in late 1999, and the catastrophic social and economic impact of the international financial crisis triggered in East Asia in mid-1997. For a detailed overview, see: NGLS Roundup No. 54, May 2000, "UNCTAD X Addresses Crisis of Global Economic Governance".

[2] "UNCTAD and Civil Society: Towards Our Common Goals" (TD/382).

[3] For more details, see NGLS Roundup, No. 54, May 2000, "UNCTAD X Addresses Crisis of Global Economic Governance".

[4] See in particular: "Effects of structural adjustment policies on the full enjoyment of human rights": Report by the Independent Expert, Mr. Fantu Cheru, submitted in accordance with Commission decisions 1998/102 and 1997/103. (E/CN.4/1999/50)

[5] For an economic analysis of these phenomena, see in particular UNCTAD's Trade and Development Reports 1995 and 1998.

[6] For a detailed discussion of this issue, see in particular R. Avi-Yonah "Globalization, Tax Competition and the Crisis of the Welfare State" in: 113 Harvard Law Review, May 2000.